Office-Supreme Court, U.S.
FILED
FEB 10 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-931

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

J. L. DAY,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

MEMORANDUM OPPOSING CERTIORARI

JIM MATTOX
Attorney General of Texas

DOUGLAS M. BECKER
Assistant Attorney General
Acting Chief, Enforcement
Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT

NO. 82-931

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

J. L. DAY,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

MEMORANDUM OPPOSING CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Jim Mattox, Attorney General of Texas, attorney for Respondent, and submits this his Memorandum Opposing Certiorari:

I.

As Petitioner admits, his petition for writ of certiorari is untimely. (Petition for Writ of Certiorari at 1-3). The judgment of the Court of Appeals in this case was

delivered on March 4, 1982 (Appendix A to the Petition), and the Texas Court of Criminal Appeals denied a petition for discretionary review on July 21, 1982 (Appendix B to the Petition). Petitioner seeks to invoke the jurisdiction of the Court under 28 U.S.C. §1257(3). (Petition at 3). Under S.Ct.R. 20.1, the petition should have been filed within sixty days, or by September 20, 1982. Since the petition was not docketed until December 8, 1982, it is untimely by seventy-nine days.

It is true that the untimeliness of a petition for writ of certiorari is not a jurisdictional defect. *E.g., Schacht v. United States,* 398 U.S. 58, 63-64 (1970). Further, one cannot help but be sympathetic to the reasons set forth by Petitioner for his tardy filing of the petition. (Petition at 2-3). Respondent submits, however, that the 1980 revisions to this Court's rules evidence an intent to be less lenient regarding untimely filed petitions. First, S.Ct.R. 20.1 has significantly shortened the time for filing petitions to review the judgment in a criminal case of a state court of last resort, as compared to former S.Ct.R. 22(1). Second, present S.Ct.R. 20.3 provides:

> "The Clerk will refuse to receive any petition for writ of certiorari which is jurisdictionally out of time."

Accordingly, it is appropriate to recall the Court's admonition in *Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co.,* 385 U.S. 32, 32-33 (1966):

> "This Court has been generous in excusing errors of counsel, but if there are to be rules, there must be some limit to our willingness to overlook their violation. While we are inclined to be generous in exercising our discretion to forgive the mistakes and waive the consequences of negligence, fairness to other counsel and to parties with business before

> the Court as well as due regard for our own procedures lead us to believe this case does not warrant our indulgence."

II.

Petitioner seeks to contest the constitutionality of a municipal parking and zoning ordinance of the City of Bellaire, Texas. He relies upon authorities of this Court standing for the proposition that legislative classifications must be reasonable and based upon proper distinctions, and that any distinctions among classes must be rational and bear some relevance to the purposes for which the classification is made. (Petition at 10-11). Even so, application of this principle to a zoning ordinance requires an understanding of the purposes for which the ordinance was promulgated; the problems that the ordinance seeks to address; whether the ordinance validly achieves these purposes; whether a less restrictive ordinance might achieve the same purposes; and the burdens the ordinance might impose upon property owners or other residents. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). In this case, however, as noted by the Court of Appeals:

> Appellant presented no evidence in the trial court relating to the invalidity of the ordinance; therefore, there is no showing that the ordinance is invalid."

(Appendix to the Petition at 4).

Thus, in this case there is no factual record available to the Court that might facilitate reasoned consideration of the constitutionality of the questioned ordinance. Certiorari should be denied.

III.

S.Ct.R. 17.1 limits review on writ of certiorari to cases where "there are special and important reasons therefor." Petitioner set forth persuasively no special or important reason why the Court should review his case.

Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DOUGLAS M. BECKER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Respondent

February _____, 1983.

PROOF OF SERVICE

I, Douglas M. Becker, Assistant Attorney General of Texas, do hereby certify that on the _____ day of February, 1983, three copies of the Memorandum Opposing Certiorari were mailed, postage prepaid, to Mr. Ben G. Levy, Attorney at Law, 4061 O'Meara, Houston, Texas 77025 and to Mr. Walter Boyd, Attorney at Law, 3317 Montrose Blvd., Suite 336, Houston, Texas 77006. All parties required to be served have been served. I am a member of the Bar of this Court.

DOUGLAS M. BECKER
Assistant Attorney General
Attorney for Respondent

SUBSCRIBED AND SWORN to before me this _____ day of February, 1983.

NOTARY PUBLIC in and for
Travis County, Texas